NO. 14-14-00589-CV

IN THE COURT OF APPEALS
FOURTEENTH JUDICIAL DISTRICT
HOUSTON, TEXAS

1717 BISSONNET, L.L.C.,

Defendant/Appellant/Cross-Appellee

vs.

PENELOPE LOUGHHEAD, ET AL.,

Plaintiffs/Appellees/Cross-Appellants

On Appeal from Case Number 2013-25155,
in the 157th Judicial District Court, Harris County, Texas

RESPONSE BRIEF OF PENELOPE LOUGHEAD, ET AL.

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ISSUES PRESENTED

1. The trial court erroneously declined to enter a permanent injunction in spite of the jury's unanimous finding that the Ashby High Rise would constitute a permanent nuisance if built.[1] In light of this decision, did the trial court properly enter judgment on the jury's unanimous findings of damages for loss in market value?
2. Was there some evidence to support the jury's unanimous finding that the proposed construction of the 21-story Ashby High Rise on a 1.6 acre lot in the middle of an historic residential neighborhood was the proximate cause of diminished market values of the Plaintiffs' homes?
3. Does Texas law require a jury finding that to be abnormal and out of place, a nuisance must be "inherently dangerous," even though no such finding is required by any decided case or by the Texas Pattern Jury Charge?
4. Was Plaintiffs' pleading of nuisance sufficient to allow the jury to consider garage lighting and construction-related issues in its determination of the nuisance question?
5. Was there some evidence to prove each Plaintiffs' ownership of property?
6. Did the trial court properly award taxable costs to Plaintiffs as prevailing parties?

[1] Argument addressing this error is set forth fully in the Brief of Plaintiffs/Cross-Appellants.

STATEMENT OF FACTS

In the late spring of 2007, Defendant/Appellant 1717 Bissonnet, LLC (the "Developer"[2]) decided to build a high-rise mixed-use apartment building on a 1.6 acre tract located at the corner of Ashby Street and Bissonnet Road (the "Ashby High Rise").[3] The Developer recognized that the Ashby High Rise would be "a departure in scale from surrounding properties," and anticipated neighborhood opposition to the project.[4] Even before it had made its plans public, the Developer took substantial concrete steps toward realizing it, starting with its purchase of the property,[5] the engagement of an architect,[6] a land planner, and a civil engineer,[7] and the completion of additional sewer capacity.[8] These early steps reflect a determination to build that never dimmed and continued through trial and judgment.

In spite of considerable immediate opposition, the Developer continued its pursuit of constructing the high rise. The Developer engaged in ongoing permitting discussions with the City of Houston (the "City"), submitting eleven separate

[2] As set forth in greater detail in the Brief of Plaintiffs/Cross-Appellants, the Developer has two original principals, Matthew Morgan and Kevin Kirton, and at the time of trial, Hunt SPV, LLC ("Hunt") owned a ninety percent interest in the limited partnership that owned the project.
[3] 10 RR 226:4-6 (decided to build the project in May or June 2007).
[4] DX 122 (Letter of introduction to Mayor Bill White acknowledging that the project would be "a departure in scale from surrounding properties").
[5] 10 RR 225:6-17.
[6] 9 RR 239:2-240:1.
[7] 10 RR 226:15-18; DX 131. Contact was made with the City regarding additional utility capacity through the prior owner of the property at the behest of the Developer. 10 RR 227:20-228:17.
[8] 10 RR 231:14-23.

proposals that were repeatedly rejected by the City because of the negative impact that the project would have on the neighborhood traffic. The Developer ultimately applied for and received a permit for a design that the Developer did not want to build.[9] Because the Developer "felt that [it was] entitled to build the original plan" (as opposed to the one the City actually permitted), the Developer sought review of the City's denial of its original permit from the appeals board and City Council, both of which rejected the Developer's position.[10] The Developer then brought suit against the City, seeking total damages of $40 million.[11] When asked to explain the purpose of the lawsuit, Kevin Kirton testified on behalf of the Developer that they just "wanted to build our building."[12] After the City could not get the lawsuit dismissed as a matter of law, the City relented and settled the Developer's claim. The terms of the Settlement Agreement between the Developer and the City were publicly announced March 12, 2012.[13]

The Settlement Agreement between the Developer and the City specified certain concessions that the Developer agreed to make in exchange for the permits it sought.[14] Among those concessions were caps on the so-called "trip-count"

[9] 3 RR 142:3-8; 11 RR 33:10-17.
[10] 3 RR 142:5-23.
[11] 3 RR 146:21-147:12; 11 RR 42:24-43:10.
[12] 11 RR 44:23-24.
[13] PX 55; 17 RR 165:5-9.
[14] PX 55.

relating to traffic generated by the project.[15] The Settlement Agreement also provided that the project would: (1) be a 21-story residential or mixed-use residential and commercial development, with 10,075 square feet of space for restaurant use; (2) contain a pedestrian plaza to be constructed in front of the project; (3) include a "green screen" on the south and east walls of the parking garage; (4) use lighting that is covered or directed away from neighboring residences; and (5) mitigate construction noise.[16] For its part, the City agreed that it would approve permits for a project that met the Settlement Agreement criteria.[17]

Once the Settlement Agreement was in place, the Developer was "excited" and "ready to get started again."[18] In the summer of 2012, Hunt—an El Paso-based real estate development concern—was about to close on a 90 percent interest in the limited partnership that owns the project, and the Developer felt the need to "hit it hard."[19] The evidence showed that the Developer's aggressive plan to "hit it hard" involved submitting deceptive permit applications that were designed to cause the City to believe that the Developer was compliant with the Settlement Agreement when its actual plans were not compliant with that agreement.[20] While Matthew

[15] RR3 157:3-9; PX 63; DX 9.
[16] DX 9.
[17] *Id.*
[18] 3 RR 174:20-175:3.
[19] 3 RR 175:2-5; 17 RR 135:7-10.
[20] PX 63; s*ee also* R11 171:3-12; R11 172:22-173:9; RR 11 148:6-24.

Morgan conceded that it "would be wrong to try to deceive the City," he also asserted that it is appropriate to file a City permit application with plans that you have no intention of building, and that is what the Developer did.[21]

The City approved the Developer's misleading permit applications, issuing the foundation and site work permit on January 16, 2013,[22] and the core and shell permit on March 27, 2013.[23] Until those permits were issued, and Plaintiffs could gain access to the detailed plans for the Ashby High Rise that the Developer planned to build, Plaintiffs could not assess the impact that the high-rise would have on their homes.

By the time of trial, it was clear that the Developer fully intended to move forward with construction of the Ashby High Rise as soon as possible.[24] The Developer had demolished the existing structure—Maryland Manor—in May 2013.[25] The Developer saw no obstacle to commencing construction other than the threat of an injunction in this lawsuit[26], and the Developer insisted that it would not even entertain an offer to buy the property at fair market value had it received one.[27] The Developer asserted that it suffered substantial losses every day of delay in

[21] 3 RR 151:4-12; 3 RR 152:9-14.
[22] 3 RR 235:20-24. DX 59; 11 RR 58:15-18.
[23] 11 RR 59:1-3.
[24] 3 RR 176:1-7.
[25] 11 RR 60:5-8.
[26] 11 RR 60:1-4.
[27] 17 RR 39:12-18.

building the high rise. The Developer claimed a rough total of $750,000 per month in losses for every month the project was not complete.[28] The Developer has never wavered from its position that the Ashby High Rise will be built. The Developer has repeatedly insisted that it intends to build,[29] and it has taken substantial steps[30] toward that end.

The record is similarly certain regarding exactly what the Developer intends to build. The jury heard substantial testimony regarding the specifics of the design, and the Developer's plans themselves were admitted into evidence.[31] In spite of the evidence of the Developer's intent to circumvent the Settlement Agreement and its misleading submissions to the City, the City's permits provide additional clarity regarding the Developer's plans and the Ashby High Rise. After the jury's verdict, the Developer began to equivocate slightly about certain particulars of its plans in its efforts to avoid a permanent injunction,[32] but the record remains clear regarding the Developer's plan.

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[28] 17 RR 144:2-145:1; 17 RR 145:21; 17 RR 146:2-6; *see also* CR 1150-51.
[29] CR 1182; 1191-95.
[30] As described above, at the time of trial, the Developer had constructed additional sanitary sewer capacity, had demolished the existing structure, had engaged multiple professionals, had sold a significant portion of equity in the project and had obtained City permits.
[31] PX 355.
[32] *See, e.g,* CR 793 (the Developer suggesting to the trial court that it would make minor changes in the design to address certain aspects of the issues raised).

Based on the evidence that the Developer is absolutely committed to constructing the Ashby High Rise, Plaintiffs' appraisal expert, Jeffrey Spilker, examined the effect of the Ashby High Rise on the value of Plaintiffs' homes. Mr. Spilker testified that the market values of plaintiffs' homes had diminished as a result of the Ashby High Rise, and he provided a detailed comparison of the market values with and without the nuisance.[33] Mr. Spilker was explicit in his testimony that the market values of the Plaintiffs' homes had already dropped.[34] Mr. Spilker's testimony was similarly clear that the diminished values resulted from the Ashby High Rise, not neighborhood signs as the Developer suggested.[35]

The jury was asked only two questions—the first on liability, the second on damages—both of which very closely tracked the nuisance submissions and definitions supplied by the Texas Pattern Jury Charge.[36] The jury found that the proposed high rise would be a nuisance if built as to some, but not all, of the Plaintiffs.[37] The jury awarded the Plaintiffs who received favorable findings on the

[33] 8 RR 174:12-16.
[34] 8 RR 189:12-23.
[35] 9 RR 73:9-13.
[36] *Compare* Texas Pattern Jury Charge 12.2C "Private Nuisance—Abnormal and Out of Place in Its Surroundings" *with* Question No. 1, CR 733-35, and *compare* Texas Pattern Jury Charge 12.5 "Damages in Nuisance Actions" *with* Question No. 2, CR 736-38.
[37] CR 733-35.

liability question two distinct categories of damages: loss of market value, and loss of use and enjoyment.[38]

After the verdict, the trial court conducted a hearing on Plaintiffs' request for a permanent injunction against the permanent nuisance. The Developer argued vehemently against the entry of an injunction. The Developer contended that an injunction would be inequitable because Plaintiffs were ***too slow*** in bringing their claims.[39] In contrast to the current argument that Plaintiffs' damage claims are premature, the Developer argued in fighting the injunction that Plaintiffs were too late.[40]

The Developer also repeatedly assured the trial court that money damages would be an adequate remedy for Plaintiffs' injuries, arguing that "[i]n this case, as the jury verdict reflects, the Plaintiffs [sic] injuries can be remedied by money damages,"[41] and that, "where, as here, the injury is of the type that damages for lost market value will compensate the plaintiff . . . then market damages are adequate compensation for permanent nuisance."[42] While it insisted that money damages were an adequate remedy, the Developer occasionally revealed its true position

[38] CR 736-38.
[39] CR 1148-49.
[40] CR 816.
[41] CR 822.
[42] CR 1193.

regarding damages, fully set forth in its brief to this Court—that damages would be an adequate remedy at law, but they are not available.[43]

The trial court adopted much of the Developer's position and declined to enter the requested injunction. In its analysis, the court accepted the Developer's argument that the Plaintiffs' delay in filing suit had caused the Developer harm, tipping the balance of equities against Plaintiffs' request for an injunction.[44] The trial court found that the Plaintiffs' "delay in filing suit while defendant continued to spend money . . . cannot be ignored."[45]

The court also agreed with the Developer's argument that damages provided Plaintiffs with an adequate remedy at law.[46] The court held that the "jury has weighed in on this issue and awarded damages to the plaintiffs."[47] On this basis, the trial court denied Plaintiffs the injunctive relief they sought.

Having denied injunctive relief, the trial court examined the jury's two-pronged damage findings. The court determined that Plaintiffs' loss of use and enjoyment damages were "speculative until the project is constructed."[48] The

[43] For example, the Developer's counsel told the trial court that "damages in this case are not ripe, but the fact that damages can be awarded at some later date is what the court would need to look at in terms of "balancing the equities." 18 RR 78:11-16.
[44] CR 1209-10.
[45] CR 1210.
[46] CR 1214.
[47] *Id.*
[48] *Id.*

judgment preserves Plaintiffs' right to "seek and recover damages for the loss of use and enjoyment of their properties resulting from the nuisance when such damages become ripe for judicial determination."[49] As to the lost market values, the trial court held:

> With respect to lost market value, . . . the Court agrees with Plaintiffs that these damages have already occurred. Evidence was presented at trial that plaintiffs have already incurred lost market value damages as a result of the planned Project.[50]

The Developer brings this appeal, asserting as its primary argument that the award of damages is unsupportable, and, as a necessary consequence, the jury's finding of nuisance must itself be set aside. Having successfully argued to the trial court that Plaintiffs delayed too long in bringing their claims and that damages are an adequate remedy for Plaintiffs' injuries, the Developer now contends that Plaintiffs brought suit too soon and damages are not available.

SUMMARY OF THE ARGUMENT

Once the trial court made the erroneous determination to deny a permanent injunction against the Ashby High Rise, which the jury determined would be a nuisance, its decision to award damages for losses in market value that Plaintiffs have already sustained was appropriate. There is no factual dispute concerning whether the Ashby high rise will be built. The Developer has never denied its plan

[49] CR 1273.
[50] CR 1216.

to build, and it has reconfirmed in its briefing to this Court that it intends to move forward. The Developer has taken substantial steps toward its goal of constructing the high rise, and the evidence at trial showed that Plaintiffs have already suffered harm as a result. Texas law provides that courts must maintain flexibility and consider the circumstances of every case when analyzing damages to real property to compensate a landowner adequately for injuries to his or her property. *See, e.g.*, *Gilbert Wheeler, Inc. v. Enbridge Pipelines (East Texas), L.P.*, 449 S.W.3d 474, 480 (Tex. 2014). After rejecting the requested permanent injunction, the trial court exercised the required flexibility and awarded damages, as found by a unanimous jury, that reflect the bare minimum of compensation owed these Plaintiffs.

The Developer's arguments opposing injunctive relief support the trial court's decision to award damages for the loss in market value that Plaintiffs' homes have already suffered. To overcome the threat of an injunction, the Developer repeatedly argued that money damages, as assessed by the jury, provided an adequate remedy at law, and the trial court agreed with that argument. The Developer has also alternated between arguments that the Plaintiffs waited too long before bringing suit, and its current argument that suit was filed too early.[51] Taken to its logical conclusion, the Developer's position is that there is never a proper time to bring a

[51] *Compare*, e.g. CR 1148-49 (suit brought too late), *with* CR 1193; 1197 (suit brought too early).

nuisance claim. The trial court properly rejected this notion, awarding the damages that had already accrued.

The Plaintiffs' evidence was more than sufficient to support the finding of nuisance and the award of damages for losses in market value. Consistent with the methodology suggested by the Texas Supreme Court, the Plaintiffs' expert witness compared the value of each of the Plaintiffs' homes both with and without the nuisance. *See Natural Gas Pipeline Co. of America v. Justiss*, 397 S.W.3d 150, 155 (Tex. 2012). The difference in those values was submitted to the jury as a measure of the damages Plaintiffs suffered as a result of the nuisance.[52] Contrary to the Developer's assertions, the Plaintiffs' expert ruled out alternative explanations for the diminution in Plaintiffs' market values, testifying clearly that the Ashby High Rise is the cause of the Plaintiffs' losses.[53]

In spite of established Texas law to the contrary, the Developer urges that a property use that is abnormal and out of place in its surroundings is not a nuisance unless it creates inherent unreasonable danger. To construct this argument, the Developer relies on *Rylands v. Fletcher*, a decision of the English House of Lords from 1868. Through a convoluted argument, the Developer contends that in *City of Tyler v. Likes*, 932 S.W.2d 489, 504 (Tex. 1997), the Texas Supreme Court quoted

[52] PX 263-292.
[53] 9 RR 71:7-74:10.

from a 1942 law review article that relied on *Rylands*. The Developer argues as if the law review article reflects current Texas law.

Texas law has not redefined "abnormal and out of place" to require a finding of a dangerous condition or activity. *See, e.g., Warwick Towers Council of Co-Owners ex. rel. St. Paul Fire & Marine Ins. Co. v. Park Warwick, L.P.*, 298 S.W.3d 436, 444 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (citing *Likes* for definition of nuisance without mentioning dangerous condition or activity); *see also* Texas Pattern Jury Charge 12.2A; 12.2C & Comment ("In the context of nuisance actions under PJC 12.2C, there is no definition for 'abnormal and out of place,' nor is there any general definition found in any Texas Supreme Court cases.")

The Developer contends that as to certain Plaintiffs whose properties are not abutting the Ashby High Rise site, the evidence is not sufficient to support the jury's finding of nuisance. In support of this argument, the Developer adopts a "divide and conquer" approach, by which it attacks individual aspects of Plaintiffs' evidence instead of reviewing the evidence as a whole. Texas law does not support the Developer's piecemeal approach. In determining whether an actionable nuisance exists, the jury must consider the evidence in the aggregate. *See Freedman v. Briarcroft Prop. Owners, Inc.*, 776 S.W.2d 212, 216 (Tex. App.—Houston [14th Dist.] 1989, writ denied) ("Whether a nuisance exists is a question to be determined not merely by a consideration of the thing itself, but with respect to all attendant

circumstances"). Even if the Developer's approach to its argument were appropriate, its specific attacks on the evidence fail because traffic and shadow are appropriately considered as part of a claim for nuisance.

The Developer's arguments regarding the absence of specific pleadings to support the nuisance findings misconstrue the nature of Texas pleading requirements. Texas law provides only that "a party may not be granted relief in the absence of pleadings to support that relief." *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex. 1983). The Plaintiffs brought a claim for nuisance,[54] and the trial court rendered judgment and granted relief upon a claim for nuisance.[55]

The Developer's argument that there is no evidence of ownership for every recovering Plaintiff likewise fails. Plaintiffs' Exhibit 6 and Defendant's Exhibits 16 and 44 supply the requisite evidence.

Finally, the Developer asserts, without any support or argument, that it should have been deemed the successful party in the trial court and awarded costs. The trial resulted in a unanimous nuisance finding and $1.2 million judgment against the Developer based on that finding. Any argument that the Developer was the prevailing party fails.

[54] CR 417-33.
[55] CR 1271-75.

ARGUMENT

A. The Trial Court Properly Entered Judgment on the Jury's Nuisance Finding and Awarded Damages for Injuries That Have Already Occurred.

Plaintiffs brought suit seeking a permanent injunction against the Ashby High Rise, a remedy that is plainly available and appropriate to protect against a private nuisance. *See, e.g.*, *Freedman*, 776 S.W.2d at 214; *Spiller v. Lyons*, 737 S.W.2d 29, 30 (Tex. App.—Houston [14th Dist.] 1987, no writ). The Developer vehemently opposed the requested injunctive relief, arguing that money damages were available and constituted an adequate remedy at law. The Developer also contended that injunctive relief should be denied because Plaintiffs waited too long before bringing their claims. The trial court adopted both of these arguments in its opinion and fashioned a judgment awarding damages for injuries that have already occurred.

Having successfully asserted these arguments, the Developer has now shifted its positions to attack the trial court's judgment, without acknowledging the inconsistency. The Developer also ignores its own evidence and argument that it fully intends to build the Ashby High Rise. The trial court properly fashioned a remedy to provide the Plaintiffs with the bare minimum compensation for their injuries caused by the Ashby High Rise.

1. The Developer Led the Trial Court Down the Path It Took.

The Developer responded to the Plaintiffs' pursuit of an injunction by urging, among other arguments, that Plaintiffs' alleged damages were not irreparable. From its first-filed pleading in this suit, the Developer has consistently fought Plaintiffs' request for injunctive relief by arguing that money damages are available.

In its special exceptions and original answer, the Developer urged the trial court that:

> Plaintiffs' remedy upon any finding that the future existence of an otherwise legally allowable building is, simply by its future existence, a permanent nuisance-in-fact, is limited to monetary damages.[56]

In its next set of pleadings, the Developer contended:

> Even if Plaintiffs could establish a claim for nuisance, the remedy would only be monetary and would not support a temporary or permanent injunction.[57]

In subsequent submissions to the trial court, the Developer repeatedly asserted that if Plaintiffs were able to prove nuisance, they could be compensated in monetary damages.[58] The Developer also argued that in the event of a finding of nuisance, the

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[56] Developer's Special Exceptions, CR 23.

[57] Developer's Brief in Support of their Special Exceptions as Supplemented CR 57.

[58] Developer's Motion for Partial Summary Judgment, CR 242-43 ("Even if Plaintiffs were able to prove a permanent nuisance. . . . Plaintiffs have an adequate remedy at law by compensation in monetary damages."); 257 ("Even if Plaintiffs could establish a claim for nuisance, the remedy would only be a monetary one."); 268 ("Furthermore, even if the Project was adjudicated a nuisance, Plaintiffs have an entirely adequate remedy at law in that any attendant damages are compensable monetarily.").

appropriate measure of Plaintiffs' damages would be "the diminution in value of their respective properties."[59]

Even after the jury returned its unanimous verdict that the Ashby High Rise would be a nuisance, the Developer continued to argue that money damages were available. For example, in its trial brief on balancing the equities, the Developer argued "[i]n this case, as the jury verdict reflects, the Plaintiffs [sic] injuries can be remedied by money damages."[60] The Developer also made the point post-verdict that "where, as here the injury is of the type that damages for lost market value will compensate the plaintiff for the impairment of use and enjoyment of the property that does not deprive the property of its fundamental character as a home, then market damages are adequate compensation for a permanent nuisance."[61]

Occasionally in its arguments, the Developer took the conflicting positions that money damages are not available while at the same time asserting that monetary damages constituted an adequate remedy at law.[62] In its motion for directed verdict, the Developer argued first that Plaintiffs' claims for damages should be dismissed,[63]

[59] Developer's Reply in Support of Motion for Partial Summary Judgment. CR 297.
[60] CR 822.
[61] CR 1193.
[62] *See, e.g.*, 18 RR 78:11-16; CR 711-15 (arguing that damages are not available and that injunction is not available because monetary damages are adequate remedy).
[63] CR 712.

and that their claims for injunctive relief should be denied because of the available legal remedy of monetary damages.[64]

Both before and after the jury's verdict, the Developer asserted every available argument in opposition to the requested injunction, emphasizing the argument that monetary damages would adequately remedy the Plaintiffs' injuries. The Developer's effort succeeded, and the trial court denied the injunction in spite of the unanimous decision that the Ashby High Rise will be a permanent nuisance, in part because of the court's determination that damages were an available and adequate remedy.[65]

The Developer has also shifted position regarding the timing of the Plaintiffs' suit. In the trial court, the Developer asserted that the Plaintiffs had unduly delayed in bringing suit, harming the Developer.[66] The trial court took this argument seriously, in spite of the ample evidence that the Plaintiffs had filed suit as soon as they had sufficient information on which to base a claim.[67] The trial court denied the Plaintiffs' request for injunctive relief in part because of the "delay".[68]

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[64] CR 713.
[65] CR 1214.
[66] CR 1148-49.
[67] CR 1030-1035 (setting forth in detail the Plaintiffs' efforts to obtain information from the Developer, ultimately resorting to a Rule 202 proceeding); CR 1209-10 (trial court opinion adopting Developer's argument that Plaintiffs waited too long).
[68] *Id.*

The Developer now attempts to distance itself from its earlier positions to assert in effect that the trial court's denial of injunctive relief renders the jury's verdict meaningless. Although it repeatedly assured the trial court that the nuisance finding could be vindicated through an award of damages, the Developer now contends that damages are not an available remedy. The Developer has also eschewed its prior position that Plaintiffs waited too long to bring suit to contend the opposite—that Plaintiffs jumped the gun in filing their suit. As set forth in greater detail below, the Developer is attempting to create a world in which the time is never right to bring a nuisance claim.

2. There Is No Factual Dispute Regarding Whether the Ashby High Rise Will Be Built.

The record is replete with evidence and arguments demonstrating that the Developer fully intends to build the Ashby High Rise. Even as it argued to this Court that damages are not available, the Developer introduced its brief by asserting that "Defendant-Appellant, 1717, plans to build a high rise apartment building on a 1.6 acre tract located at 1717 Bissonnet Road." Appellant's Brief at 1. The Developer provided evidence to the trial court purporting to show that it lost substantial sums of money every day that the Ashby High Rise is not built.[69] The Developer asserted in the trial court that the only impediment to construction was the threat of

[69] 17 RR 144:2-145:1; 17 RR 145:21; 17 RR 146:2-6; *see also* CR 1150-51.

injunction,[70] but now that the trial court has denied that injunction, the Developer seeks to create doubt regarding its intent to build. The evidence before the trial court was not disputed that the Ashby High Rise would be built absent injunctive relief; the trial court properly relied on that evidence in awarding damages for injuries that have already occurred based on the jury's unanimous finding of nuisance.

3. Plaintiffs' Expert Used the Proper Method for Calculating Damages.

Plaintiffs' expert, Jeffrey Spilker, testified that the Plaintiffs' homes had lost market value because of the Ashby High Rise. Mr. Spilker detailed his method at some length, explaining that he began by identifying the general market area, and the area within that market area that is impaired by the detrimental condition—proximity to the Ashby High Rise.[71] Mr. Spilker described his "core" "traditional appraisal methodology"[72] to compare the actual values of the Plaintiffs' homes to their values if there were "no tower announced to be built and city settlement."[73] To accomplish that, Mr. Spilker selected comparable properties that were not impaired by the Ashby High Rise and, using the sales-comparison approach, compared their values to the values of the Plaintiffs' homes.[74] The sales-comparison approach "is an accepted, and even favored, means for determining the market value of land."

[70] 11 RR 60:1-4.
[71] 8 RR 188:3-23; 196:19-197:1.
[72] 8 RR 197:8-13.
[73] 8 RR 198:11-20.
[74] 8 RR 202:16-203:7; PX 263, 292, 294.

Houston Unlimited Inc. Metal Processing v. Mel Acres Ranch, 443 S.W.3d 820, 829 (Tex. 2014). The Developer does not challenge Mr. Spilker's methodology and even concedes in its brief that "it is true that loss of market value is the proper measure of damage for a permanent nuisance."[75]

Mr. Spilker also made clear that the diminution in the values of Plaintiffs' homes had already occurred even though the Ashby High Rise had not yet been built:

> Q. [By Mr. Frizzell] And so how are you calculating damages now, when the project has not been built yet?
>
> A. [By Mr. Spilker] Because the market has reacted to the project. And markets such as real estate and stock, the market reacts to information and the market reacts to the information that the tower is going to be built. The actual construction, the actual building of the tower may have some effect; but what we found in the way we look at these is we measure what the current effect has been because that reflective [sic] in the market data.
>
> And that has already been incurred and it is a floor, because the value of real estate is always related to risk. And until the project is built there is some unknown factor that it may not be built.[76]

The evidence that injury has already occurred distinguishes this case from those on which the Developer relies to challenge the trial court's judgment.

[75] Appellant's Brief at 24.
[76] 8 RR 189:10-23.

4. The Trial Court Correctly Entered Judgment on the Jury's Finding of Nuisance Because Plaintiffs' Homes Have Already Suffered Diminished Values.

As set forth above, the Plaintiffs introduced ample evidence to show that injuries to the Plaintiffs have already occurred.[77] The jury agreed that the values of certain Plaintiffs' homes had already been diminished by the Ashby High Rise, and it awarded lost market value damages to the owners of twenty of the thirty homes involved.[78] The trial court entered judgment on the jury's verdict for the losses in market value, holding that the damage had "already occurred."[79]

"A permanent nuisance claim accrues when the injury *first* occurs or is discovered." *Schneider Nat. Carriers, Inc. v. Bates*, 147 S.W.3d 264, 270 (Tex. 2004) (emphasis original). The market has responded to the Developer's plans, and there was no factual dispute regarding the Developer's intent to build. These circumstances distinguish this case from the cases on which the Developer relies for its attack on the award of damages.

Allen v. City of Texas City, 775 S.W.2d 863, 864 (Tex. App.—Houston [1st Dist.] 1989, writ denied) involves a claim for inverse condemnation. In *Allen* the question was not whether damages were available, but instead whether the actions of the City of Texas City constituted a taking, damage or destruction of the plaintiff's

[77] 8 RR 189:10-23.
[78] CR 736-37.
[79] CR 1216.

property such as required for a finding of inverse condemnation.[80] *Id.* The court's holding that an inverse condemnation had not occurred in that case has no bearing on whether the injuries that have occurred in this case are compensable.

Corley v. Exxon Pipeline Co., 821 S.W.2d 435, 437 (Tex. App.—Houston [14th Dist.] 1991, writ denied), is similarly not salient to the question here. That case stands for the undisputed proposition that a cause of action for damages to land accrues for limitations purposes when the land is damaged. Again, the trial court found that the damages it awarded here ***have*** occurred.

Sanders v. Miller, 113 S.W. 996 (Tex. Civ. App.—Texarkana 1908, no writ), involves a claim of nuisance relating to the presence of a pool in the yard of a neighbor. The facts showed that the excavation of the pool was complete, but the pool had not yet filled with water. *Id.* at 996. The plaintiff alleged that the pool constituted a nuisance because it would become a breeding ground for malarial mosquitoes. The plaintiff provided evidence of a reduction in value of his property as a result of the construction of the pool. In reversing the award of damages, the court examined the nature of the nuisance and concluded that it was temporary and

[80] "Inverse condemnation is a 'cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.'" *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 476 (Tex. 2012) (quoting from *United States v. Clarke*, 445 U.S. 253, 257 (1980)). The public policy questions involved in such takings cases are substantial and unrelated to the nuisance claim asserted here.

could be abated. *Id.* at 999. Accordingly, the court held that damages relating to diminished market value were not available, holding:

> The appellee not having alleged any damages except the depreciation in the value of his realty, the judgment in his favor cannot be permitted to stand if we conclude that the pool if a nuisance is an abatable one.

Id. at 1000. In the absence of appropriate evidence of damages, the court reversed the trial court's judgment. *Id.* The Ashby High Rise will be a permanent nuisance that cannot be abated. Damages for lost market value are appropriate.

The Texas Supreme Court has recognized that in measuring damages to real property, a court must remain flexible, and must keep in mind that the purpose of the law "'in every case, is to compensate the owner for the injury received, and the measure of damages which will accomplish this in a given case ought to be adopted.'" *Gilbert Wheeler, Inc*, 449 S.W.3d at 480 (quoting from *Pacific Exp. Co. v. Lasker Real Estate Ass'n*, 81 Tex. 81, 83 (1891)); *see also Taylor v. Gossett*, 269 S.W. 230, 234 (Tex. Civ. App.—Dallas 1925, writ dism'd w.o.j) (rule is not by any means inflexible); *Shell Oil Co. v. Jackson Co.*, 193 S.W.2d 268, 272 (Tex. Civ. App.—Galveston 1945, no writ) ("That measure of damages should be adopted in each case which will most nearly compensate for the loss sustained."). This emphasis on flexibility reflects the law's acknowledgment that real property is unique, necessitating particularized remedies. *See, e.g., Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 211 (Tex. 2002); s*ee also Greater Houston Bank v. Conte*, 641

S.W.2d 407, 410 (Tex. App.—Houston [14th Dist.] 1982, no writ) ("It is well established law that each and every piece of real estate is unique."); TEX. CIV. PRAC. & REM. CODE § 65.011(5). Having erroneously denied the Plaintiffs' request for a permanent injunction, the trial court relied on well-established principles and the undisputed evidence to fashion a remedy at law.

5. The Developer's Suggested Result Is Untenable.

The logical consequences of the Developer's position would put injured landowners in an untenable position. Under the structure suggested by the Developer, a landowner threatened by a nuisance must sue right away if he or she wishes to ask for an injunction, even if the landowner lacks detailed information about a project and cannot conduct good-faith diligence into the actual impacts that a project will have on the surrounding properties. Otherwise, the landowner will face an accusation that its injunction request should be denied because its "delay" in filing suit has injured the potential defendant. Then, if the trial court denies injunctive relief (***even after a jury finds a nuisance and damages have already accrued***), the Developer would insist that the landowner must sue all over again after the nuisance is in place to recover damages.

According to the Developer's theory of the case, the time is never right to bring suit—bring it too early and damages are not ripe, bring it too late and an injunction is unavailable. The Developer would force a victim of a permanent

nuisance to either forego a chance at an injunction by waiting to file suit until the full impact of the permanent nuisance is inflicted upon them, or risk having to pursue two separate lawsuits (an early one for an injunction, and a later one for damages), with the risk of inconsistent results, not to mention the burden and cost to the parties and the court system of requiring multiple lawsuits about the same permanent nuisance. Texas law does not and should not impose such a burden on the victims of a permanent nuisance, like Plaintiffs in this case.

Texas law reflects a policy of flexibility in fashioning remedies for injuries to real property. The Developer's arguments, if adopted, would contravene the purpose of that policy and would substantially restrict the remedies available to those who suffer injury to their homes. When the trial court entered judgment, it had before it (1) a unanimous finding of nuisance; (2) evidence that the Plaintiffs' homes had already suffered damage; (3) the Developer's assurances that damages were an available remedy; (4) undisputed evidence that the Developer intends to build the Ashby High Rise (and evidence of the steps the Developer had already taken in furtherance of the Ashby High Rise project that had already caused damage to Plaintiffs), and (5) its erroneous determination that a permanent injunction was not appropriate. Under these circumstances, the trial court properly entered judgment on the nuisance claim and awarded damages.

B. The Evidence of Proximate Cause Was Sufficient.

The Developer attacks the legal sufficiency of Plaintiffs' evidence that the public announcement of a 21-story multi-use high-rise building in the middle of an historic residential neighborhood of single-family homes was the proximate cause of Plaintiffs' injuries. An examination of the record makes clear that Plaintiffs provided ample evidence of proximate cause.

Mr. Spilker's testimony was unequivocal that the harm he evaluated was caused by the Ashby High Rise, and not by yard signs, as the Developer contended.[81] He testified that the "signs themselves do not cause the problem, because the signs without the project would not affect value."[82] He further testified that the diminution in value is caused by the project.[83] Mr. Spilker provided the jury with evidence that in addition to his comparable sales method, he conducted a "fairly complex statistical" analysis to confirm his findings.[84] Mr. Spilker's market research was sufficient to eliminate the other potential causes for diminished property values and to ensure that the harm relates solely to the Ashby High Rise.[85] Mr. Spilker examined large numbers of comparable sales to ensure that all extraneous variables

[81] 9 RR 72:9-13.
[82] *Id.*
[83] 9 RR 74:7-10.
[84] 8 RR 196:22-197:7.
[85] 8 RR 197:23-200:17; 8 RR 201:3-11.

were eliminated.[86] In short, Mr. Spilker's testimony was more than sufficient to support the jury's finding of proximate cause.[87]

C. Texas Law Does Not Impose a Requirement of Unreasonable Danger.

The Developer contends that the jury's liability findings are based on a "novel theory" of nuisance even though the language of the charge, which asked whether the Ashby High Rise would be "abnormal and out of place in its surroundings" was taken directly from the Texas Pattern Jury Charge.[88] The Developer in effect asks this Court to redefine "abnormal and out of place" to include a component of inherent danger, ignoring the PJC's clear guidance that "there is no definition of 'abnormal and out of place' nor is there any general definition found in any Texas Supreme Court cases." TEXAS PATTERN JURY CHARGE 12.3C Comment.

The Developer bases its proposed definition of abnormal and out of place on a very tenuous interpretation of a 1997 Texas Supreme Court decision, *City of Tyler v. Likes*, 962 S.W.2d 489, 504 (Tex. 1997). Instead of examining the language and holding of that opinion, the Developer contends that the case "must be understood within the doctrine of *Rylands v. Fletcher*,"[89] a case decided by the House of Lords in the nineteenth century. The basis for the Developer's contention that *Rylands* is

[86] 8 RR 205:3-209:22; PX 293; 9 RR 25:7-15.
[87] 9 RR 72:1-19; 9 RR 74:7-10; 9 RR 76:1-9.
[88] *Compare* CR 733 *with* Texas Pattern Jury Charge 12.3C.
[89] *Rylands v. Fletcher*, L.R. 1 Ex. 265 (1866), *aff'd* L.R. 3 H.L. 330 (1868).

central to the Supreme Court's analysis in *Likes* is a block quotation from a 1942 law review article, which the Developer sets out in full.[90] According to the Developer's argument, it is this citation—and not the case holding—that demonstrates that the Court intended to engraft an inherently dangerous requirement onto nuisance law. Not a single case or the Texas Pattern Jury Charge has ever held that the definition of "abnormal and out of place in its surroundings" implies a requirement of inherent danger or "ultrahazardous activity."

Apparently recognizing the absence of authority for its position, the Developer turns its attention to Texas case law regarding claims for surface water diversion,[91] along with various iterations of the Restatement of Torts.[92] Again, the Developer provides no basis on which to conclude that Texas law imposes the requirement that to be abnormal and out of place, a nuisance must involve an inherent danger or ultrahazardous activity.

Having redefined "abnormal and out of place in its surroundings," the Developer then turns its attention to the evidence of nuisance presented to the jury and argues that there is no evidence that any of it is abnormally dangerous. Given that Texas law does not require evidence of inherent or unusual danger for a finding of nuisance, these arguments fail.

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[90] *See* Brief of Appellant at 32.
[91] *Id.* at 34-38.
[92] *Id.*at 37.

D. There Was Sufficient Evidence that the Ashby High Rise if Built Will Constitute a Nuisance as to All Plaintiffs.

The Developer argues that certain of the Plaintiffs—those whose properties are not abutting the Ashby High Rise site—did not adduce sufficient evidence to support the claim of nuisance. To assert this argument, the Developer brings piece meal attacks on particular evidence of nuisance that the jury heard, including the evidence of increased traffic levels and the effects of the shadow that the Ashby High Rise will cast on Plaintiffs' homes.

Texas law does not permit the kind of piece-by-piece examination of the evidence that the Developer is calling for. Instead, the law requires that in evaluating whether an actionable nuisance exists, the jury must consider all of the evidence in the aggregate. *See Freedman*, 776 S.W.2d at 216 ("Whether a nuisance exists is a question to be determined not merely by a consideration of the thing itself, but with respect to ***all attendant circumstances***"); *see also Schneider Nat. Carriers, Inc.*, 147 S.W.3d at 270 (indicating that an aggregation of "foul odors, dust, noise and bright lights—if sufficiently extreme—may constitute a nuisance"); *GTE Mobilnet of South Texas Ltd. Partnership v. Pascouet*, 61 S.W.3d 599, 615 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (jury considered both noise and light in reaching nuisance finding); *Lamesa Co-op Gin v. Peltier*, 342 S.W.2d 613, 616 (Tex. Civ.

App.—Eastland 1961, writ ref'd n.r.e) (findings of loud noises, glaring lights, dust, odors, smoke and cotton lint aggregated to support nuisance judgment).

In its attack on the evidence of increased traffic, the Developer contends that Plaintiffs lack standing to raise issues relating to increased traffic because any nuisance created by traffic would be a public, not a private nuisance. The Developer's principal supports for this contention are *West v. City of Waco*, 294 S.W. 832 (Tex. 1927), which holds that streets belong to the State, and *Grommet v. St. Louis County*, 680 S.W.2d 246 (Mo. App. 1984), a decision by an intermediate court of appeals in Missouri. Neither provides the necessary support.

Texas courts have recognized that property owners have an interest in unimpaired ingress and egress to and from their properties, *see, e.g.*, *DuPuy v. City of Waco*, 396 S.W.2d 103, 108 (Tex. 1965) (citing *Powell v. Houston & T. C. R. Co.*, 135 S.W. 1153 (Tex. 1911)) ("[O]wnership of the lot abutting upon the street carried with it as property the right of free and unimpaired access thereto and egress therefrom, and whatever impaired that right and caused a depreciation of the value of the lot constituted damage to the lot. . . ."). The Developer's contention that the traffic issues relating to the project constitute only interference with a public right of travel ignores this important independent right.

Furthermore, Texas courts have allowed the consideration of traffic congestion and other traffic issues in considering questions of private nuisance. In *Spiller*, a group of private homeowners sued a developer alleging that its plan to construct a motel would create a private nuisance. 737 S.W.2d at 30. The evidence presented at trial by the neighborhood residents "established that the increased traffic would be a danger to children . . . and that traffic and the influx of strangers and transients would be an offense to normal sensibilities." *Id.* The jury found in favor of the plaintiffs, but the trial court granted a JNOV. After reviewing the evidence, including the evidence of increased traffic, the Fourteenth Court of Appeals reversed the JNOV and rendered judgment that included a permanent injunction. *Id.*

Likewise, in *Lethu Inc. v. City of Houston*, 23 S.W.3d 482, 490 (Tex. App.—Houston [1st Dist.] 2000, pet. denied), the First Court of Appeals reversed a summary judgment on a private nuisance claim in part because the City's actions increased traffic congestion near plaintiffs' property. In reaching its decision, the court stated:

> Although [defendant] is correct that there is not a property right in the volume of traffic or visibility of property, this argument does not adequately address [plaintiffs'] claims for private nuisance. . . . [T]he property right involved in [plaintiffs'] claims is their easement of access, which is a recognized property right. The barricade [impeding traffic] is alleged to have interfered in the private use and enjoyment of their easement. *Thus, this argument is not a sufficient theory to support summary judgment.*

Id. 490 (citations omitted; emphasis added). *See also Champion Forest Baptist Church* v. *Rowe*, 1987 WL 5188, *1 (Tex. App.—Houston [1st Dist.], Jan. 8, 1987) (citing evidence that "traffic problems would be augmented by use of a garage" in upholding injunction prohibiting construction of garage).

The evidence at trial regarding traffic demonstrated that the addition of 232 apartment units, more than 10,000 square feet of restaurant space, and hundreds of parking spaces on a 1.6-acre lot situated in a neighborhood of single family homes and two lane roads will cause traffic that will substantially interfere with Plaintiffs' ingress and egress to their homes and with the safety and enjoyment of the adjacent landowners.

The Developer next urges that shadow cannot be part of a nuisance claim. As an initial matter, Plaintiffs' evidence regarding the shadow that the Ashby High Rise will cast was offered as part of the evidence of the damage that the high-rise would cause to the plants and landscaping of certain Plaintiffs.[93] The shadow, by itself, may not constitute a nuisance, but the evidence of the physical damage it will cause to the properties of certain Plaintiffs is certainly relevant and appropriate evidence for the jury to have considered.

[93] 8 RR 130:18-131:20; 132:7-134:17.

Further, authority on the question of shadow as nuisance is sparse, but the authority that exists suggests that shadow may be considered. The court of appeals' opinion in *Ladd v. Silver Star I Power Partners, LLC*, 11-11-00188-CV, 2013 WL 3377290 (Tex. App.—Eastland May 16, 2013, pet. denied Mar. 21, 2014) (mem. op.) is perhaps the most instructive. *Ladd* involved a claim that windmills constituted a nuisance. The case was carefully postured by the parties on appeal so that the sole issue was the viability of the plaintiff's nuisance claim based purely on his aesthetic complaint that the windmills "create an eyesore that destroys the natural beauty of the . . . countryside:" The court of appeals explained:

> Silver Star did not attack Ladd's claim that the wind turbines created a nuisance as a result of the noise, the shadow and flicker effect caused by the blades at sunset, and the effect of the blinking red lights located on the turbines. The trial court granted Silver Star's motion for [partial] summary judgment. The parties filed an agreed motion to sever the nuisance claim related to aesthetics from those based on the noise, the shadow and flicker effect, and the blinking red lights. The parties also entered into a Rule 11 agreement in which they agreed Ladd would dismiss all of his claims, with prejudice, if this case involving the visual nuisance claim is ultimately affirmed on appeal. See Tex. R. Civ. P. 11. The trial court granted the agreed motion, severed the visual nuisance claim from the remaining claims, abated those remaining nuisance claims from the claims at issue here, and entered a final judgment.

Ladd v. Silver Star I Power Partners, LLC, 2013 WL 3377290 at * 1. Thus, the Court of Appeals *specifically distinguished* between a purely aesthetic complaint about the appearance of the windmills on the one hand and the effects of the shadows cast by windmills on the other. *Id.* at *3 (recognizing that plaintiff "did not assert a

claim for nuisance based solely on aesthetic impact, but also based on noise, [shadow] flicker effect, and blinking red lights"). The court's opinion supports the proposition that shadows, like noise and light intrusions (and unlike purely aesthetic complaints), are actionable.

The First Court of Appeals' opinion in *Champion Forest* likewise suggests that shadow can properly be considered in determining whether a structure is a nuisance. 1987 WL 5188 at *1 (allowing evidence that the proposed garage would block wind and light). Authority from other states likewise suggests that shadows cast by a structure may in some circumstances constitute a nuisance. *See, e.g.*, *Sowers v. Forest Hills Subdivision*, 294 P.3d 427, 430 (Nev. 2013) (noise, shadow flicker, and diminution in value support trial court's permanent injunction based on nuisance); *Prah v. Maretti*, 321 N.W.2d 182, 239 (Wis. 1982) (nuisance law has the flexibility to protect both a landowner's right of access to sunlight and another landowner's right to develop land).

The Developer also argues that Texas has rejected the doctrine of "ancient lights" and that allowing the jury to consider shadow as part of Plaintiffs' nuisance claim is tantamount to reviving the ancient lights doctrine. Plaintiffs recognize and acknowledge that Texas has rejected the ancient lights doctrine. "Ancient lights" operated on a prescriptive easement theory that made the first-improved property the "dominant estate" as between two neighboring tracts, and gave the dominant estate

an absolute right to receive light over neighboring land. *See Klein v. Gehrung*, 25 Tex. Supp. 232, 238 (Tex. 1860) (describing "English doctrine" as one "of a prescriptive right to prevent obstructions to window-lights, adopted in analogy to the statute of limitations"). Critically, ancient lights was rejected in Texas because it had nothing to do with the reasonableness of the proposed improvements on the servient estate, and could be used to prevent improvements comparable in size and character to those on the dominant estate. *See id.* at 242-43 (owner of log cabin could not enjoin neighbor from erecting "fence of ordinary height" based only on partial obstruction of air and light to first-story windows). Allowing shadow and the physical damage that it will cause to neighboring landowners to be considered in determining whether a structure is "abnormal and out of place" so as to unreasonably interfere with a plaintiff's use and enjoyment of her home does not equate to giving her a prescriptive easement to access to light. *See Harrison v. Langlinais*, 312 S.W.2d 286, 287-88 (Tex. Civ. App.—San Antonio 1958, no writ) (citing cases rejecting ancient lights doctrine but distinguishing nuisance as separate cause of action). Instead, allowing a fact-finder to consider the effects of the shadow on neighboring properties in determining a nuisance claim is simply a recognition of the flexibility of nuisance doctrine and the place it occupies in Texas law. *See Champion Forest*, 1987 WL 5188 at *2 (rejecting "ancient light" argument as challenge to nuisance finding). Nuisance law demands that a plaintiff prove an

unreasonable interference that substantially interferes with use and enjoyment and that is abnormal and out of place in its surroundings, and the issue and effect of shadow can be part of the "attendant circumstances" that comprise a nuisance.

The Developer next contends that the jury should not have been permitted to consider Plaintiffs' evidence regarding privacy as part of the claim of nuisance. The Developer does not, however, analyze the privacy evidence in the context of a nuisance claim, but instead asserts that Plaintiffs failed to establish the tort of invasion of privacy. The Developer's argument that Plaintiffs have not fulfilled the elements of an invasion of privacy tort is, if true, beside the point. Plaintiffs asked the jury, and the jury found, that the Ashby High Rise will constitute a nuisance. Plaintiffs' claim of nuisance is premised (in part) on inevitable invasions of privacy. As the Court has correctly recognized, invasions of privacy facilitated by an adjoining landowner can support the finding of a nuisance. *See GTE Mobilnet* 61 S.W.3d at 614; *Champion Forest Baptist Church*, 1987 WL 5188, *1 (citing evidence that "the view from the garage would invade [plaintiffs'] privacy").

E. The Pleadings Support the Judgment

The Developer contends that Plaintiffs' pleadings do not allege that garage lighting or construction noise would constitute a part of the nuisance. The Developer confuses, however, the necessity of pleading a cause of action with the notion that specific evidentiary details of that cause of action must also be pleaded. Texas is a

notice pleading state. *See* Tex. R. Civ. P. 47. Because Plaintiffs broadly pleaded nuisance, all of the evidence relating to that claim was properly submitted and considered by the jury in rendering its verdict.

F. The Evidence Demonstrated Ownership by Every Plaintiff

The evidence is sufficient to demonstrate that each of the Plaintiffs, including those who did not testify, owns his or her residence in the neighborhood. That evidence includes Plaintiffs' Exhibit 6, which is a chart introduced by Plaintiffs' expert; Defendant's Exhibit 16, which summarizes data obtained from Harris County Appraisal District ("HCAD") and includes the challenged Plaintiffs' names;[94] and Defendant's Exhibit 44, which is a map also obtained from HCAD. Additionally, the Court's charge, as submitted to the jury, defines "Plaintiffs" to mean "the property owners who are plaintiffs in this action." The Developer did not object to this definition.

The Developer's contention that only the owners of real property have standing to bring a nuisance claim is not Texas law. The law instead provides that a person with a vested interest, including for example a tenant, has standing to assert claims for nuisance. *Schneider Nat. Carriers*, 147 S.W.3d at 268 n.2; *Holubec*, 111 S.W.3d 32, 34-35 (Tex. 2003); *see also Freedman*, 776 S.W.2d at 215 (a person with "mere naked possession of land, without title or vested interest therein," cannot bring

[94] HCAD provides information relating to owners of real property.

a nuisance claim). There is ample evidence that all Plaintiffs have a vested interest in the land beyond "mere naked possession." Multiple exhibits submitted by both sides establish that the address associated with that Plaintiff is his or her residence.[95] The Developer's challenge to the verdict based on standing fails as a matter of fact and as a matter of law.

CONCLUSION

For the reasons set forth in the Brief of Cross-Appellants, the trial court erred in refusing to grant a permanent injunction against the Ashby High Rise, given the jury's unanimous finding of nuisance. In light of that erroneous ruling, the court's judgment awarding damages to the prevailing Plaintiffs was appropriate and should be affirmed.

[95] *See* PX 6; DX 16; DX 44.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I hereby certify that this Brief contains 9021 words, excluding the words not included in the word count pursuant to Texas Rule of Appellate Procedure 9.4(i)(1). This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

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CERTIFICATE OF SERVICE

As required by Texas Rules of Appellate Procedure 6.3 and 9.5, I certify that I have served this document on all parties on July 1, 2015 via e-filing and/or e-mail.

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